Construction, Production & Maintenance Laborers' Local 383, Laborers' International Union of North America, AFL-CIO (Arizona Building Chapter, Associated General Contractors, et al.) and Gustavo Gutierrez. Cases 28-CB-1919 and 28-CB-1948

2 June 1983

DECISION AND ORDER

By Chairman Dotson and Members Jenkins and Hunter

On 16 December 1982 Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Construction, Production & Maintenance Laborers' Local 383, Laborers' International Union of North America, AFL-CIO, Phoenix, Arizona, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This consolidated matter was heard before me in Phoe-266 NLRB No. 164

nix, Arizonia, on September 30, 1982. The matter arose as follows. On March 25, 1982,1 Gustavo Gutierrez, an individual, filed a charge docketed as Case 28-CB-1919 against Construction, Production & Maintenance Laborers' Local 383, Laborers' International Union of North America, AFL-CIO (the Union or Respondent), and amended that charge on May 5. On May 6 the Regional Director for Region 28 of the National Labor Relations Board (Regional Director) issued a complaint and notice of hearing based on the amended charge. On May 25, Gutierrez filed a charge, docketed as Case 28-CB-1948, against Respondent. On June 16 the Regional Director issued a complaint based on Case 28-CB-1948 and an order consolidating cases consolidating the two complaints for a common hearing. Thereafter appropriate orders setting and rescheduling the time of the hearing issued.

The complaints allege that the Union in March and May adversely affected the placement of Gutierrez' name on the Union's out-of-work list used in dispatching applicants to jobs under the hiring hall provisions of collective-bargaining agreements with area employers. The complaints allege that the Union took these actions because of Gutierrez' efforts with other members to oppose the Union's incumbent administration, and therefore violated Section 8(b)(1)(A) and (2) of the Act. The Union denies that it has violated the Act.

FINDINGS OF FACT

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, to argue orally, and to file posthearing briefs.

Upon the entire record herein, including briefs from the General Counsel and Respondent,² and from my observation of the witnesses and their demeanor, I make the following findings of fact.³

I. JURISDICTION

At all times material herein, the Arizona Building Chapter, Associated General Contractors, and the Asso-

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² We do not agree with the Administrative Law Judge's analysis of the 6 May 1982 incident in which Respondent Union deleted the name of Gustavo Guiterrez from its out-of-work list. We find it unnecessary, however, to determine whether Respondent Union violated Sec. 8(b)(1)(A) and (2) by this action. Any remedy we would order if we were to find a violation in this incident would merely be cumulative and would not affect the remedy already provided.

¹ All dates refer to 1982 unless otherwise indicated.

² The due date for filing of posthearing briefs pursuant to the Board's Rules and Regulations, Sec. 102.42, was set by me at the hearing as November 4, 1982. Thereafter the due date for filing was extended to December 3, 1982. The Union's brief was timely received although it lacked the statement of service on other parties required by the rules. The General Counsel's brief included such a statement but was not received until December 6, 1982. The General Counsel's brief was transmitted by first class certified mail and mailed on December 2, 1982. At the hearing I specifically noted that the parties were obligated to select a means of transmission for their briefs which would reasonably be expected to achieve delivery by the time set. I further noted that briefs sent by regular mail from Arizona should be mailed 2 days before the due date. Thus, in my view counsel for the General Counsel, after being sepcifically warned, failed to take reasonable care to insure timely delivery of her brief. I find the posthearing submissions of the parties were each defective under the rules and that each was accordingly susceptible to being stricken. However, since there were defects in each party's post-hearing submission, I deem it appropriate to receive both.

³ Where not otherwise noted, these findings are based on stipulations, admitted pleadings, or unchalleged credible testimonial or documentary evidence. The unopposed motion of the General Counsel to correct the transcript is hereby granted.

ciated General Contractors, Arizona Chapter (hereinafter collectively referred to as the Associations), have each been associations of employers which exist for the purpose of, *inter alia*, engaging in collective bargaining on behalf of their respective employer-members with Respondent, negotiating collective-bargaining agreements, and resolving grievances arising in connection with collective-bargaining agreements among the employees of their respective employer-members.

During the past calendar year, which period is representative of their annual operations generally, the employer-members of each of the Associations, who are primarily engaged in performing services in the building and construction industry, during the course and conduct of their respective business operations, have collectively purchased goods and materials valued in excess of \$50,000 and have caused the same to be transported in interstate commerce and delivered to their respective places of business within the State of Arizona, directed from States of the United States other than the State of Arizona.

II. LABOR ORGANIZATION

Respondent is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union and the Associations have at all relevant times maintained collective-bargaining agreements which provide, *inter alia*, for the operation of an exclusive hiring hall by the Union. The contracts obligate employers to request laborers from the hall in accordance with the Union's hiring hall procedures.

The hiring hall referral procedures include provisions for employer requests of specific individuals and for requests for general applicants. Calls for general referents without specification by name are filled by the Union from names on the out-of-work list on a first-in first-out basis. An individual on the out-of-work list who has risen to the top of the list may not refuse to accept an employment referral without having his or her name dropped from the list. An exception to this procedure exists where requests are made for individuals with special skills which the particular referral applicant is not qualified to perform. These specialized requests are filled by referral of the highest individual on the list possessing the necessary skills or qualifications.

In 1979 the following referral rule was adopted by the Union:

Any person dispatched who fails to appear as dispatched and who willfully has by his/her action denied other registrants the right to a dispatch, shall be considered as worked and shall be placed at the bottom of the proper respective list.

Any such aggrieved person upon appeal, under the provisions of the collective-bargaining agreement, will be granted a hearing so that his/her action may be reviewed and justified. The individual who had been dispatched would normally sign at the bottom of the list upon conclusion of employment. In circumstances where the job received does not last more than a day, the referent may have his or her name returned to its previous position at the top of the list upon request.

B. The Individuals and Companies Involved Herein

At relevant times, John Moya, Sr., was the business manager and secretary-treasurer of the Union. He had overall responsibility for the operation of the Union and the hiring hall procedures. Librada "Libby" Rodriguez was the dispatcher for the Union. Her duties included the operation of the dispatch process. She received and recorded requests for referents by employers, made job referral announcements in the hall, maintained the Union's out-of-work or dispatch lists, and maintained and prepared other records necessary to the hiring hall function at the Union.

Gustavo Gutierrez is a man of substantial physical proportions. During relevant times he was a classic example of a militant union dissident. He was a former union business agent, an active reformist, and leader of a portion of the membership openly opposed to the personalities and policies of the Union's leadership. By publicity, organization, litigation, charges with the Board, intraunion political campaigns, and complaints to the Union's governing International, and by various other means, Gutierrez sought to resist the Union's incumbents, change their policies, rally support in opposition against them, and ultimately to replace them. In these ongoing disputes, at least through the events in question herein, Gutierrez was an active and public leader of the Union's opposition forces.

Bell Bottom Foundation of Arizona (Bell Bottom), with an office located in Phoenix, is an employer who utilizes the Union's hiring hall. Among the types of laborers requested through the hall, Bell Bottom had occasion to request caisson cleaners, whose function was to enter and clean out the caissons used by Bell Bottom in constructing building foundations. While the skills of such individuals are not necessarily specialized, any laborer undertaking the work must be unusually diminutive so as to be able to pass through the narrow openings and passages in the equipment.

C. Events

Antonio Moreno, a longtime member of the Union and regular user of the hiring hall, testified that he received a job dispatch on March 24 after his name had worked its way to the top of the out-of-work list. The dispatch was for a job starting on March 25 at an employer with a Phoenix address. Moreno was unable to locate the employer when attempting to report to work on March 25. He called the employer and was told that the correct location of the worksite was in Mesa, a separate city. He was also told by the employer that the job was going to be canceled and he would not be able to work. Moreno then returned to the union hall and spoke to Rodriguez. He told her that he could not find the location of the job listed on the referral. He also asked her if he would be

paid "show-up time." She answered, in Moreno's memory, that he would not because he did not physically go to the job. Moreno asked Rodriguez if he would keep his place on the out-of-work list and she replied that he would retain his former position. He did so.

That same day, March 25, Moreno obtained a new dispatch calling for a March 26, 6:30 a.m., report at Bell Bottom. Moreno testified that he listened closely for any job call because he knew he was first on the list. Rodriguez called out a job for two men and then announced his name and another's. While he could not recall at which point she made the statement, Moreno testified that Rodriguez told him the job referral was to Bell Bottom for cleaning bottom holes. She did not mention the size of the holes. Moreno testified that he never did learn what type of holes were involved in the Bell Bottom job.

Gutierrez testified that on the afternoon of March 25 he knew he was second on the out-of-work list. He was waiting at the hall when he heard Rodriguez call out two jobs for Bell Bottom and then call Moreno's name and his own. Consistent with normal procedure, he stood behind Moreno at the dispatcher's window while Moreno obtained his dispatch slip. He testified he overheard Moreno ask Rodriguez if he would be bypassed if he did not take the job. Rodriguez said he would. Thereafter Gutierrez obtained his dispatch slip from Rodriguez without engaging in any conversation.

Rodriguez testified that on March 25 she received a telephone request from Bell Bottom requesting two caisson cleaners. She knew from experience that workers for such jobs must be small. She announced the job to the waiting referral applicants, recalling that she said that two caisson hold cleaners were requested and that they should be small. She testified that Moreno and Gutierrez came to her window and were issued dispatches to the job. She also testified that she knew that the job call required small workers, but that when Gutierrez came to the window for his referral slip she issued it to him without comment based on the assumption that he was more knowledgeable about job requirements than she.

The next morning Gutierrez and Moreno independently left their homes and attempted to locate Bell Bottom. The morning was quite dark and the weather was inclement. Moreno had some trouble finding the job and arrived late. He was told by Ralph Blehm, Bell Bottom's assistant manager, that the rain made the job too wet. Blehm told him to go home and come back later to pick up his show-up time. Moreno left and telephoned Bell Bottom around noon. He was told it was still too wet to work. He returned to the job and picked up his show-up wages and his referral slip which reflected that his work was completed. Moreno then went to the hiring hall at or around 3 p.m. He testified that he turned in his referral slip to Rodriguez and told her that the job had been canceled. She returned Moreno to his previous place on the out-of-work list and soon thereafter he was referred to another job. Rodriguez testified that she had no recollection of these events but did not dispute their occurGutierrez had great difficulty locating the jobsite that morning and decided to telephone the job for directions. He also had trouble locating the correct telephone number for the site but finally reached Blehm. Gutierrez testified that Blehm told him that the employer had canceled the order for men because of the rain. Gutierrez told Blehm that he had to have his referral slip signed by the employer so that he could get back on the out-of-work list. He obtained directions to the site and went to the job. Blehm testified that Gutierrez called him and told him he could not find the site. Blehm told Gutierrez it did not matter because the weather made work impossible. Blehm recalled Gutierrez then stated he wanted his slip signed and Blehm gave him directions to the site.

Blehm testified that after this conversation with Gutierrez he looked in his desk for termination slips and could not locate any. He then called the union hall. He first spoke to Rodriguez and then to John Moya. Following a discussion regarding union referral slips and how they were to be used, Blehn told Moya that Gutierrez said he needed his termination slip signed for the union hall records. He continued telling Moya that the job was canceled due to rain and that there had only been 1 day's work for the requested men. Moya testified that he recalled a telephone conversation with Blehm but did not remember Blehm making any reference to Gutierrez by name. Rather, he recalled that Blehm told him that he had received a call from one of the laborers who had not shown up at the site and that the laborer had asked for a referral slip that stated he had been terminated because of job completion. Moya recalled Blehm asked him what he should put on the referral slip and that Moya told him to put down the truth.

Gutierrez testified that he went to the Bell Bottom office and there spoke to Blehm who referred him to Art Rollinson, another official of the company. Gutierrez spoke to Rollinson but was interrupted by a phone call, apparently from Moreno reporting in to Rollinson. Gutierrez overheard Rollinson tell the caller to come in and pick up his show-up pay. After the call the conversation resumed. Gutierrez asked Rollinson to fill out his referral slip so that he could get back on the out-of-work list. Gutierrez indicated he thought he was being blackballed by the Union. Rollinson started to fill out the slip writing that Gutierrez could not locate the job. Gutierrez protested that he was at the job and Rollinson crossed out the notation and entered "Is to [sic] large for cleaning holes."5 Rollinson told Gutierrez that he could not climb inside a caisson either. Gutierrez then left without asking for or receiving show-up pay.

Gutierrez then returned home but later went to the hiring hall. He went to the dispatch window and there spoke to Rodriguez. He testified he gave her the filled-in referral and his union membership card. She opened the out-of-work registry and entered his name, not at its previous location, but at the bottom of the list. Gutierrez testified that he asked her why she was putting his name at the bottom of the list and that she answered, in his

⁴ Bypassing an individual on the list results in the loss of his position on the list.

⁵ There was no doubt that Gutierrez' substantial dimensions made it impossible for him to physically enter and clean caisson holes—which are some 22 inches in diameter.

memory, "Because Mr. Moya told me so." Gutierrez was taken aback by this and retreated for a brief time. Then he spoke to a nearby fellow member, Walter "Bud" Beasley, and asked him to be his witness. The two returned to the dispatch window. The following events were testified to by Beasley:

So we approached the windows, double window and [Gutierrez] was at one and I was at the other. He asked Libby if Mr. Moya told her to put him on the bottom of the list and she said, "Yes."

Then Gus said, "Well, what reason did he give you?" And she said, "He didn't have to give me a reason," just more or less he paid the bills so she said, "He didn't have to give me a reason."

This version of events was corroborated by Gutierrez. Rodriguez however testified that she had no recollection of speaking to Gutierrez at this time. Nor did she recall receiving his referral slip. Both Moya and Rodriguez denied that they had spoken together about Gutierrez' place on the list. Indeed, Moya denied knowing anything about Gutierrez' dispatch or his out-of-work list placement difficulties at the time.

Moya, however, in a signed sworn statement given on April 20, 1982, stated:

Because of the information I received that Gutierrez had not reported for work at Bell Bottom, I advised the dispatcher to put him at the bottom of the list in accordance with the long standing practice at Local 383 that employees who accept work and fail to report will lose their place on the hiring hall absent some good excuse for not reporting. When an employee is ill or has car trouble, he will generally not lose his place on the list for reporting to work. Such was not the case, however, with Gutierrez.

Moya's recollection on the stand was not refreshed by reading the above quotation. He did not attack the truth of the statement but rather asserted he simply had no current memory of the events it recited. Gutierrez testified that he filed the instant original charge that afternoon.

Sometime thereafter Gutierrez again signed the out-of-work list placing his name at the bottom. On or about May 6 Gutierrez checked the out-of-work list and noted that his name had been removed. Gutierrez testified that he then asked Rodriguez why his name was not on the list. She answered that he had missed roll call. Gutierrez denied this and told her he had witnesses. Rodriguez walked away briefly and soon returned, whereupon she restored Gutierrez' name to its former position on the list. No referrals were lost as a result of this temporary removal of Gutierrez' name. Rodriguez' memory of the event was not clear. She testified that she seemed to recall that Gutierrez had missed roll call but later that he had restored his name to the list.

D. Analysis and Conclusions

1. Arguments of the parties

The General Counsel, citing unchallenged Board doctrine, argues that a union cannot properly discriminate against a hiring hall applicant because of his internal union activities. Further, the General Counsel argues a union may not deviate from its regular hiring hall procedures in a manner which denies employment opportunities to applicants without inherently encouraging union membership and thus violating the Act, citing N.L.R.B. v. Iron Workers Local 433, 598 F.2d 154, fn. 5 (9th Cir. 1979), quoting with approval Electrical Workers Local 592 (United Engineers & Construction Co.), 223 NLRB 899, 901 (1976).

Counsel for the General Counsel notes the activities of Gutierrez in organizing opposition to the Union's incumbents must be judged as more threatening to the Union than the relatively limited strength of that opposition. Thus, the preceived threat, not the reality, is advanced as relevant. She also argues that the March events were the first opportunity that the Union had to adversely influence Gutierrez' employment prospects. The General Counsel also argues that, irrespective of any findings of animus, Respondent must be found to have violated the Act because it failed to follow its regular hiring procedures, as illustrated by the treatment of Moreno, to Gutierrez' detriment. In this connection it is argued that the May events must be viewed as a followup act of discrimination, a "potent jab to the memory," reminding Gutierrez and others of the Union's unlawful control over employment opportunities.

Respondent challenges several contentions of the General Counsel. First, while conceding the active dissident conduct of Gutierrez and the protected status of that conduct under the Act, the Union notes the paucity of evidence that Moya or current union agents have made threats or shown animus against Gutierrez. Counsel for the Union argues that Gutierrez was simply not perceived as a realistic threat by Moya and the union leadership given the lack of member support for him as reflected in the 1982 union election. The Union also argues that, contrary to the General Counsel's assertions at hearing, there was neither evidence that the Union and Gutierrez had difficulties which came to a head in 1982, nor evidence of previous illegal union discrimination against Gutierrez. Second, the Union argues, based on the testimony of Rodriguez, noted supra, that Gutierrez did not return to the hiring hall on March 26 to explain the earlier events of the day. Had he done so, counsel for the Union argues, Gutierrez still would not have been eligible to retain his place on the list because he failed to timely show up for work as required by his dispatch to Bell Bottom.

With respect to the May delisting allegation, the Union argues that its error was inadvertent, merely clerical, and was corrected immediately upon its discovery. Counsel for the Union notes the agreement of all parties that Gutierrez suffered no loss of employment opportunities as a result of the error and further argues that any violation which occurred is at best technical.

⁶ For a referral applicant to retain his or her position on the out-of-work list, the applicant must be present at periodic roll calls.

2. Resolution of credibility

Few directly contradictory versions of events appear on the record. Moreno was essentially uncontradicted and was a highly credible witness with a sound demeanor and no apparent interest in shaping his testimony. I fully credit his testimony. Blehm was a forthright witness with an excellent demeanor and a good memory of events. He, too, had no apparent reason to shade his answers. I fully credit his testimony even where it was at variance with Moya as to the substance of their telephone conversation. Beasley's brief testimony was straightforward and unambiguous. I was impressed by his apparent honesty and guileless demeanor. I fully credit him.

Moya and Rodriguez testified that they did not recall certain events testified to by others. Thus, Rodriguez did not recall seeing Gutierrez on March 26 nor having the two conversations described by Gutierrez. Beasley's corroboration of Gutierrez' account of the second conversation convinces me that both Gutierrez and Beasley were correct and that Rodriguez has suffered a failure of recollection. Moya expressed no recollection of having had knowledge of Gutierrez' activities on March 26. He denied issuing orders to Rodriguez to drop Gutierrez' name from the hiring hall list. I have credited Blehm's version of the Moya-Blehm telephone call on the morning of March 26, therefore I find Blehm identified Gutierrez to Moya. I further credit the pretrial affidavit of Moya that he learned of Gutierrez' difficulties from Blehm and told Rodriguez to drop Gutierrez from the hiring hall list. Indeed, Moya did not dispute his earlier written statement; rather, he merely testified he had no recollection of the actions as of the time of the hearing. It is therefore not necessary to specifically discredit Moya's testimony to find that the events of March 25 and 26 occurred as noted in his affidavit⁷ and in Blehm's and Gutierrez' testimony. I do so here.

These findings require that I discredit Rodriguez' denial that Moya told her to remove Gutierrez' name from the list. I do so without hesitation given the credited testimony by Beasley and Gutierrez as to what she said and did. Like Moya I believe that Rodriguez has suffered a failure of recollection.

Gutierrez has been credited, supra, where his testimony was in conflict with others. The bulk of his testimony was not contradicted and is also credited. His demeanor was impressive. One portion of his testimony, however, is inconsistent with other evidence and is discredited. Gutierrez testified that, after his altercation with Rodriguez on March 26, he went to the Board offices and filed a charge. The original charge in Case 28-CB-1919 was filed on March 25 and is time-stamped as received at the Board offices at 11:26. Thus, it is clear that the charge was filed on the day before. At that time Gutierrez had not received his dispatch to Bell Bottom. There is no record evidence that any other charge was filed by Gutierrez on March 26. It is clear therefore that Gutierrez was mistaken in his testimony. More likely he went to the Board the afternoon of March 26 to report that day's events as part of his evidence in support of his March 25 charge.

3. Analysis

I have considered the uncontradicted evidence and the legal and factual arguments of counsel in light of the credibility resolutions made, supra, and the record as a whole. For the reasons which follow, I conclude that the Union violated Section 8(b)(1)(A) and (2) of the Act when it dropped Gutierrez' name from the hiring hall list on March 26 rather than restoring his name to the position it enjoyed at the time of his Bell Bottom dispatch. I further conclude that the Union also violated Section 8(b)(1)(A) of the Act when it temporarily deleted Gutierrez' name from the out-of-work list in May. As to this latter violation, however, I also find, in agreement with the Union, that the violation does not affect the remedy ordered in the cases.

Turning initially to the March 26 events, it is clear and I have found that Moya ordered Rodriguez to drop Gutierrez' name based on the information gleaned in Moya's phone call with Blehm. It is also clear that it was rare for Moya to interfere with Rodriguez in her operation of the referral process. I have credited Blehm that he told Moya of the cancellation of the Bell Bottom job and of the job's maximum 1-day duration. Either circumstance would properly require reinstatement or retention of Gutierrez' name on the list under the Union's procedures and practice. Rodriguez, who had authority to and regularly did reinstate referents' names on the list when the initial job was canceled due to weather, or when the job was no more than I day in duration, did not act on Gutierrez' representations to her on the afternoon of the 26th. Yet she did restore Moreno's name to its previous position. Rather she merely told Gutierrez she had received orders from Moya to drop his name. This was done even though Gutierrez had a slip from Bell Bottom which stated that Gutierrez was too large for the job. She thus failed to restore his place on the list, apparently due to Moya's orders, despite evidence supplied by Gutierrez which justified his restoration under the Union's rules.

I reject the argument of the Union that Gutierrez properly lost his place because of his late arrival at the Bell Bottom job. The assertion is not supported by the 1979 union resolution quoted supra, which by its terms penalizes only those that fail to appear as dispatched and also "denied other registrants the right to a dispatch." Second, the assertion is completely inconsistent with the Union's hiring hall practices as evidenced both by Moreno's experiences and by Moya's testimony regarding the relative ease with which the name-dropping was amelioriated for applicants who claimed extenuating circumstances. While the Union asserts Gutierrez could have come to Moya and explained his situation, I have found Moya knew of the critical extenuating factors before he instructed Rodriguez to drop his name.

I am in general agreement with the Union that the extensive evidence offered by the General Counsel regarding Gutierrez' activities against the Union's incumbent officers must be heavily discounted by the paucity of evi-

⁷ Moya's affidavit is receivable substantively because it is not hearsay as defined in the Fed. R. Evid. 801(d)(1)(A) and 801(d)(2).

dence of discrimination or threats against Gutierrez by Moya or other union agents at relevant times. Clearly it may not be simply assumed that union reform advocates, howsoever active and even strident they are, inevitably engender sufficient animus on the part of the trade union officers to stimulate illegal discrimination. Given the unusual circumstances of March 26 found above however, I am satisfied that counsel for the General Counsel has met her burden of proof and has shown that the conduct of the Union in denying Gutierrez his former place on the list was in violation of Section 8(b)(1)(A) and (2) of the Act. The Union's actions on that occasion were so unusual, arbitrary, and unreasonable as to require the inference, which I draw, that they were taken because of Gutierrez' dissident union activity. I make this finding even without greater evidence of animus by the Union. Indeed, even without evidence of animus, as the General Counsel argues, the Union's disregard for its precedures would sustain the General Counsel's allegations herein under current Board law.

The May name deletion event could arguably have been an innocent clerical error. The Union did not dispute the existence of an error either to Gutierrez at the time he complained or at the hearing. Rather, the Union correctly asserts that the error was quickly remedied and that there is little evidence it was other than as a result of inadvertence. While I agree that the consequences of the deletion were minimized by the subsequent restoration of Gutierrez' name to its proper place on the list, I cannot find the error mere inadvertence given the context of events herein. On this record the General Counsel may rely on the circumstances of the earlier illegal act, as found supra, to carry the May allegation where there is no contrary evidence offered to support the Union's claim of innocent error. In this sense, the burden of going forward as to May had been shifted to the Union by the findings as to March. The Union failed to affirmatively prove that the May event was but innocent error. I therefore find the May name deletion was also a violation of Section 8(b)(1)(A) of the Act. It is clear, however, that the brief deletion of Gutierrez' name from the list had no adverse effect on his employment prospects. Further, as but a second violation of Section 8(b)(1)(A) of the Act, the violation does not expand the appropriate remedy ordered, infra.

Upon the foregoing findings of fact and the entire record herein, I make the following:

CONCLUSIONS OF LAW

- 1. The Associations are employers engaged in commerce within the meaning Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Union violated Section 8(b)(1)(A) of the Act by deleting the name of Gustavo Gutierrez from the Union's hiring hall out-of-work list in March and May 1982, because of his internal union activities.
- 4. The Union violated Section 8(b)(2) of the Act by deleting the name of Gutierrez from the Union's hiring hall out-of-work list in March 1982 thereby preventing him from being dispatched to employment with an em-

ployer because of his union activities, thereby causing that employer to discriminate against Gutierrez in violation of Section 8(a)(3) of the Act.

THE REMEDY

Having found that the Union engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Union make Gutierrez whole for any loss of earnings he may have suffered as a result of the denial of his dispatching opportunities. I shall further require the Union to make him whole for any loss of nonwage benefits he would have earned had he been dispatched in accordance with a nondiscriminatory application of hiring hall procedures including accrued hours used for group eligibility under the dispatch classifications and loss of nonwage fringe benefits. Backpay shall be computed in accordance with Board policy as described in F. W. Woolworth Co., 90 NLRB 289 (1950), and Isis Plumbing & Heating Co., 138 NLRB 716 (1962). Moneys due shall accrue interest in accordance with Board policy as described in Florida Steel Corp., 231 NLRB 651 (1977). The Union will also be ordered to preserve and, upon request, provide to the Regional Director or his agents, for inspection and copying, all records necessary to determine the amount of backpay due under the terms of this Order and to ensure that its terms have been fully complied with.

I shall also require the Union to post customary remedial notices. The Union shall also be required to submit appropriate signed copies of the notice to the Regional Director for submission to the Association for posting, should it be willing.

There is some evidence that communication with all of the Union's membership would be best assured by provision of bilingual notice. The General Counsel has not asked for such a remedy beyond asking for an "appropriate" notice on brief. The Board has held in Doral Hotel & Country Club, 240 NLRB 1112, fn. 3 (1979), that bilingual notices shall not be provided where the record does not reflect that the employees involved do not speak English or primarily speak another language. I am of the view that the need to effectively communicate the meaning and content of the Board's notice to employees is of sufficient importance to direct bilingual posting even where evidence of need is slight. I shall do so here.

⁸ Gutierrez' intraunion literature was bilingual; i.e., both in Spanish and English.

The Board normally orders its notices posted in "customary" locations without greater specificity. The Regional Director in the compliance stage of the proceeding normally determines the number and location of notices for posting. See, e.g., National Labor Relations Board Case-handling Manual, sec. 10526.3. So, too, when ordering the posting of bilingual notices, the Board issues only an English language notice and the Regional Director causes that notice to be translated into the appropriate additional languages. Thus, the Regional Director determines the exact language used on the non-English notices. This delegation of discretion by the Board to the Regional Director in regard to notices has not in my experience caused much dispute or litigation. It also seems appropriate to allow the Regional Director, in his or her informed discretion, a similar latitude or discretion to determine if notice posting should

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I issue the following recommended Order:

ORDER10

The Respondent, Construction, Production & Maintenance Laborers' Local 383, Laborers' International Union of North America, AFL-CIO, Phoenix, Arizonia, its officers, agents, and representatives, shall:

- 1. Cease and desist from:
- (a) Deleting, dropping, or otherwise removing referral applicants' names from the Union's hiring hall out-of-work list because of their internal union activities.
- (b) Causing or attempting to cause the Associations and their member-employers to discriminate against employees in violation of Section 8(a)(3) of the Act because of the employees' internal union activities.
- (c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.
- 2. Take the following affirmative acton which is deemed necessary to effectuate the policies of the Act:
- (a) Make Gustavo Gutierrez whole for any loss of earnings and other benefits he may have suffered by reason of the discrimination against him together with appropriate interest in the manner set forth in the section of this Decision entitled "The Remedy."
- (b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records, reports, work lists, and other documents necessary to analyze the amount of backpay due under the terms of this Decision and Order and to otherwise ensure the terms of this Order have been fully complied with.
- (c) Post at all places where notices to applicants for referral and members are posted copies of the attached notice marked "Appendix," as well as a Spanish lan-

include notices in languages other than English. It is increasingly true that demographic circumstances may change after a hearing which changes would not affect the merits of a case nor the English version of any remedial notice but would affect the number of languages on which the notice should be posted. Disputes regarding an exercise of the Regional Director's compliance discretion in this regard will likely be few and would be susceptible to resolution, if necessary, on motion to the Board or in subsequent hearings.

¹⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

11 In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

guage version thereof, if found appropriate by the Regional Director. Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

- (d) Return to the Regional Director appropriate signed copies of the attached notice marked "Appendix" for restransmission to the Associations for posting, should they be willing.
- (d) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing in which all sides had a chance to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and to obey its terms

The National Labor Relations Act obligates unions, including this Union, to operate their hiring halls on a non-discriminatory basis.

WE WILL NOT drop the names of hiring hall registrants from our out-of-work lists because they oppose the Union's officers and policies.

WE WILL NOT cause or attempt to cause employers to discriminate against employee applicants because of their union activities by dropping them from their proper place on hiring hall out-of-work lists

WE WILL NOT in any like or related manner restrain or coerce employees or cause employers to restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL make whole Gustavo Gutierrez for any and all losses he may have suffered because of our discrimination against him and WE WILL pay him appropriate interest.

CONSTRUCTION, PRODUCTION & MAINTE-NANCE LABORERS' LOCAL 383, LABORERS' INTERNATIONAL UNION OF NORTH AMER-ICA, AFL-CIO